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No.

IN THE

Supreme Court of the United States

October Term, 1983

LOCAL UNION NO. 3 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

v.

HENRY INGRAM, JAMES BRITT, WILLIAM MOODY and ROY T. FLOYD, individually and on behalf of all persons similarly situated,

and

SHELLY L. ANDERSON, JAMES L. PERRY, individually and on behalf of all others similarly situated,
Respondents.

Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit

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Questions Presented.

1. Do the Civil Rights Acts impose upon a union an obligation to *recruit* class members when the only nexus between the union and the class is the fact that some class members work adjacent to union members?

2. Does this Court's teaching in *United Parcel Service v. Mitchell* mandate the application of statutes of limitation contained in state Fair Employment Practices Acts, rather than of state statutes of limitation for *negligent* torts, to cases involving intentional discrimination under §1981?

3. Is the appropriate standard for determining union agency in Civil Rights cases

(a) this Court's teaching in *United Mine Workers v. Gibbs* applying the clear proof standard, or

(b) this Court's teaching in *Carbon Fuel v. United Mine Workers* that unions are not held liable for damages absent proof of instigation, ratification, support or encouragement of the prohibited acts or

(c) applicable state law determining union liability for members' acts or

(d) none of the above?

4. Which, if any, of these four teachings of this Court should be applied in connection with the determination of backpay awards against unions in Civil Rights cases?

(a) the teaching that only actual futility, not a reasonable belief of futility, excuses a union member's

failure to appeal to all designated union officials in a fair representation case (*Clayton v. International Union UAW*);

(b) the teaching that a claimant must mitigate damages by taking the desired job without retroactive seniority, without abandoning his claim for such seniority (*Ford Motor Company v. EEOC*);

(c) the teaching that a misjudgment of an applicant's objective job qualifications which is not found to be pretextual does not expose a defendant to liability (*Texas Department of Community Affairs v. Burdine*), and

(d) the teaching that NLRB principles should guide the courts in tailoring Civil Rights Act remedies (*Teamsters v. United States*), with respect to the abatement of union backpay liability.

5. Is a fully compensatory award to an attorney who obtained no class benefit for that work and who prevailed primarily in obtaining backpay awards which he shared through contingency retainers necessarily contrary to this Court's teaching in *Hensley v. Eckerhart*?

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No.

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HENRY INGRAM, JAMES BRITT, WILLIAM MOODY, and ROY T. FLOYD, individually and on behalf of all persons similarly situated,

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SHELLY L. ANDERSON, JAMES L. PERRY, individually and on behalf of all others similarly situated,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit is reported at 709 F. 2d 807 and at 32 FEP Cases 41 and appears in the Appendix hereto (1a). It affirmed as modified the decisions of the United States District Court for the Southern District of New York (Sand, J.), reported at 482 F. Supp. 414, 21 FEP Cases 718, 482 F. Supp. 426, 32 FEP Cases 536, 482 F. Supp. 918, 32 FEP Cases 538, 535 F. Supp. 1082, 32 FEP Cases 547 and 21 FEP Cases 71 all of which appear in the Appendix. These decisions, *inter alia,* awarded the plaintiffs in this class employment discrimination suit backpay, frontpay and attorneys' fees, the total monetary award, with interest, being in excess of one million dollars. The Second Circuit affirmed as not clearly erroneous the District Court's adjudication of liability, and it modified the District Court's award upon its finding that only seven persons were victims of the union's discrimination, in that no more than seven class members would have been hired as laborers absent discrimination. The Second Circuit thereupon divided the District Court's backpay awards to seven persons, totalling $345,716, among the eighteen class members to whom the District Court awarded backpay.

The Second Circuit approved the District Court's allowance to plaintiffs' attorney of a fee "based upon 1,280 hours at $100 an hour," and apparently overlooked the fact that the effect of its modification was to fix the attorney's allowance at $217,447.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on June 13, 1983. This petition for certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked under 62 Stat. 928, 28 U. S. C. §1254(1).

Statutes Involved.

The statutes involved are 42 U. S. C. 1981 and 42 U. S. C. 2000, the pertinent texts of which are set forth in the Appendix.

Statement of the Case.

A. The proceedings below.

On August 13, 1973, respondents Ingram, Britt, Moody, and Floyd, black porters working at Madison Square Garden for Allied Maintenance Corporation and represented by Local 54 of the Service Employees International Union, filed charges against Madison Square Garden Center, Inc. (Garden) and Allied Maintenance Corporation (Allied) with the Equal Employment Opportunity Commission, pursuant to Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e *et seq.*, alleging that Garden and Allied discriminated against them and other black porters by paying them less than the white laborers for doing similar work and by maintaining segregated job classifications. The EEOC concluded that the Garden and Allied were violating Title VII, and, on October 4, 1976, following unsuccessful conciliation efforts, issued right-to-sue letters to the four complainants. On December 30, 1976, the porters filed a proposed class

action suit against the Garden and Allied, alleging violations of 42 U. S. C. §§ 1981 and 1985 as well as Title VII. On June 22, 1977, Local 3 was added to the litigation by means of an amended complaint, which charged that the Union was actively and passively conspiring with Garden and Allied to discourage minority cleaners from seeking and obtaining jobs as laborers.

On November 24, 1975, respondents Anderson and Perry, black porters who worked at the Garden, filed discrimination charges with the EEOC against the Garden, Allied, and Local 3. On January 16, 1978, a right-to-sue letter issued, and on March 31, 1978, a proposed class action complaint on behalf of the Anderson group was filed.

The District Court certified a Title VII class and a §§ 1981 and 1985 class in both actions. In the *Ingram* action, the Title VII class, whose claims, of necessity, were limited to the Garden and Allied, consisted of all blacks who, after February 14, 1973, had been or would be employed as cleaners at the Garden. The §§ 1981 and 1985 class consisted of all blacks and Hispanics who, after December 30, 1973, had been or would be employed as cleaners at the Garden. Certification of both classes in *Ingram* was conditioned on the intervention of lavatory and bowling alley attendants and elevator operators as named plaintiffs. Thereafter, Williams, a black lavatory attendant, Milon, a black bowling alley attendant, Mitchell, a black elevator operator, Bruton, a retired black cleaner, and Garcia, an Hispanic cleaner, intervened. The *Anderson* classes were defined in the same manner as those of *Ingram*, except that the Title VII *Anderson* class limitation was May 28, 1975, and the §§ 1981 and 1985 *Anderson* class limitation was March 31, 1975, and both classes claimed against the Garden, Allied, and Local 3.

On July 13, 1978, the *Ingram* and *Anderson* actions were consolidated. On July 16, 1979, the District Court denied the Union's motion to decertify the classes. Subsequently, the plaintiffs entered into a proposed consent decree with the Garden and Allied, in which the Garden agreed among other things to hire five named class members, and defendants agreed to pay $117,500 in settlement of plaintiffs' monetary claims plus $47,500 in attorneys' fees. On October 23, 1979, the settlement was approved by the District Court (61a). In the meantime, the case had proceeded to trial against Local 3 on the issue of liability. On October 3, 1979 the District Court dismissed plaintiffs' §1985 claims, and held the Union liable under both Title VII and §1981 (48a).

The District Court referred the factual remedial issues to a Magistrate and instructed the Magistrate to award backpay and seniority to every class member who desired a laborer's job as of the date of the next laborer hire that followed his application or "qualifying desire," the backpay being subject to the 2-year limitation period of Title VII and the 3-year limitation period applicable in New York to §1981 (90a).

Upon receipt of the Magistrate's Report and Recommendations, the District Court, *inter alia*, awarded the plaintiff's backpay, frontpay, and attorneys' fees, the total monetary award with interest being in excess of one million dollars. Timely notice of appeal to the Second Circuit was filed by the petitioner, and on June 13, 1983, a panel of the Second Circuit affirmed as modified the decision of the District Court.

B. The facts.

Approximately sixty permanent laborers usually are employed at Madison Square Garden (Garden), primarily

to perform the strenuous stagehand work of effecting the changeovers for Garden's entertainment events, which requires moving heavy objects and making repairs. Between 1965 and 1977, Local 3 referred 66 laborers to the Garden. Ten, or fifteen percent, of these were either black or Hispanic. Referrals by the Union of only seven additional blacks or Hispanics would have raised its minority referral percentage to approximately 26% and thus would have altered the racial composition of Garden laborers so that it approximated that of the general Metropolitan area (6a-7a).

The District Court drew an inference of discrimination from the "statistical disparity" evidenced by the figures (58a) and found that Local 3 "hired *[sic]* blacks or Hispanics * * * in numbers significantly below their percentage in the labor market surrounding the Garden" (153a).

The District Court found, among other things, that the efforts of several class members to secure laborers' positions were deliberately frustrated by union personnel who on several occasions "either *ignored,* gave evasive answers to or just generally gave the run-around to class members who sought information from them as to how to become a laborer" [emphasis supplied], and that this " '[got] the message across' and created an atmosphere which discouraged class members from actively seeking a laborer's position" (33a-34a). The Court coupled the frustrating conversations with the "statistical disparity" and the "standardless" method of referral to support a finding of discriminatory intent (120a). The only "union personnel" identified as having either "ignored" or given evasive answers or a 'run-around' to anyone was Mel Mullins, a laborer shop steward, who played no role in the referral or

hiring process. Mullins became laborer steward in 1968. No plaintiff testified that Mullins gave him a 'runaround' after 1971.

James O'Hara, the Union representative for the Garden laborers and the person who made job referrals, received over 300 requests for jobs during the period at issue, not a single one of which came from a class member. There is nothing in the record to indicate that, discrimination aside, class members would have been given preference over other applicants. Indeed, since the Union counted 4,300 blacks and Hispanics among its own members, it is unlikely that preferred treatment would have been given to members of another union (11a).

The porters awarded backpay had no nexus—no relationship—with the union, other than the fact that they worked in the same areas of Madison Square Garden. The porters were members of a rival union.

The petitioner is a conglomerate of some forty autonomous divisions, perhaps the smallest of which is the MSG Division, consisting of approximately sixty laborers employed at the Garden. Before Local 3 was added as a defendant in the instant action at the instance of the Garden, none of the union's elected officers was aware of the referral procedures at the Garden and of the resulting racial imbalance.

Most of the eighteen men among whom the Second Circuit divided the backpay awards which the District Court granted to the first seven applicants, never told anyone connected with Local 3 about their interest in the laborer job. *None* of these eighteen men ever so advised their own union, which controlled laborer jobs at Yankee Stadium

and Shea Stadium and had knowledge of many laborer jobs controlled by racially integrated Laborer unions, to which the plaintiffs' own union would have referred them.

Soon after the plaintiffs commenced this lawsuit against the Garden and Allied, the petitioner's delegate proposed to the Garden that it promptly commence hiring plaintiffs. The Garden replied that such hiring would await the termination of the litigation, and the Garden thereupon proposed to the District Court that the petitioner be added as a defendant. On the eve of trial, the Garden and Allied settled with the plaintiffs. The settlement package included laborer jobs for five named porters, who subsequently were granted substantial backpay awards.

Nine of the eighteen class members awarded backpay had received suspensions, warnings and other discipline from Allied while they were working as porters at the Garden. The Garden testified that it did not voluntarily hire any persons with comparable disciplinary records.

The Reasons for Granting a Writ.

The reasons for granting a writ are:

I. This case supports the novel, significant and most unfortunate proposition that the Federal Civil Rights Acts impose upon unions an *affirmative* obligation with respect to classes of persons who have no relationship with the unions. This case could be cited with equal justification as supporting the proposition that the Civil Rights Acts impose a similar *affirmative* obligation upon employers who have no relationship with classes of minority persons.

II. An apparent if not an actual conflict between the Second Circuit and the First Circuit with respect to

whether the more appropriate statute of limitations for Federal Civil Rights Act violations is the statute of limitations contained in the applicable state Human Rights Law or the much longer period set forth in state statutes applicable to general negligent torts.

III. This case presents the significant question, not yet considered by this Court, when a union's officers and membership are unaware of an act of discrimination, of whether the restrictions upon the imposition of financial liability mandated by this Court in *Carbon Fuel v. United Mine Workers* and/or *United Mine Workers v. Gibbs,* and/or such restrictions mandated by applicable state laws should be applied.

IV. This case also presents the significant questions of whether the award of backpay

(a) to persons who did not apply to the union, despite the absence of clear proof of actual futility of such application, is contrary to this Court's teaching in *Teamsters v. United States,* a civil rights case, and in *Clayton v. International Union, UAW,* a fair representation case;

(b) to persons who did not inform their own union of willingness to accept jobs similar to those supplied by petitioner union without restrictive seniority, is contrary to this Court's teaching in *Ford Motor Company v. EEOC;*

(c) to persons who because of their disciplinary records for nonpretextual reasons were deemed unqualified by the employer, is contrary to this Court's teaching in *Texas Department of Community Affairs v. Burdine,*

(d) covering a period of years after the union abated its liability in accordance with NLRB principles, is contrary

to the teaching of this Court in *Teamsters v. United States* that NLRB law should guide the courts in tailoring remedies under Civil Rights Laws.

V. This case presents to this Court for the first time the question of whether the award of a fully compensatory fee to a prevailing attorney in a civil rights action whose work produced no class benefit, but produced substantial backpay awards which the attorney shared pursuant to contingency retainers, is permissible in the light of this Court's teaching in *Hensley v. Eckerhart*.

I. The unconscionable affirmative obligation imposed upon unions by this decision.

The petitioner, a union consisting of some forty autonomous divisions including a division consisting of some sixty laborers employed at Madison Square Garden, was found liable for having ignored and failed to recruit the porters and other cleaners employed at the Garden, which cleaners are employed by another employer and are represented by a rival union. The only nexus between the petitioner and the cleaners was the fact that the laborers and the porters worked near each other.

The District Court was "not impressed" with the union's testimony relating to why it did not recruit laborers from the membership of the rival union, because "Local 3 had nothing to lose" by so doing (34a). The union's testimony that it did not recruit from any of the many other trades, mostly white, also working at the Garden was undisputed.

Adverting to the fact that the laborer steward on several occasions *ignored* and gave evasive answers to porters who

inquired about the laborer position, the Second Circuit said that it "might have reached a different conclusion" as to whether these incidents, coupled with the racial statistical disparity and the standardless method of referral supported the District Court's finding of discriminatory intent, but the Second Circuit concluded that it could not state that the District Court clearly erred (8a).

The Second Circuit *sub silentio* adopted the District Court's implied conclusion that the union had an affirmative obligation to recruit and not to ignore the Garden's cleaners, and that this affirmative obligation, owed to the cleaners as a class, was greater than its obligation to other trades working at the Garden and greater than its obligation to the 4,300 other Black and Hispanic members of Local 3.

This decision therefore may be understood either as supporting the erroneous proposition that the Civil Rights Laws are affirmative action statutes—in which case employers generally must share the union's concern—or as supporting the peculiar proposition that mere physical proximity creates a nexus between a union and a group of persons, which in turn creates an affirmative action on the part of the union to recruit them and not to ignore them.

II. The conflict in circuits relating to Statutes of Limitation.

Despite the facts that the Statute of Limitations contained in the New York Human Rights Law is one year, and that the Statute of Limitations in New York for intentional torts is one year, and that a finding of violation of §1981 requires a finding of intentional discrimination, the Second Circuit declined to reconsider its use in §1981 cases

of New York's three-year Statute of Limitations for negligent torts (8a).

The First Circuit applied the six-month statute contained in the Massachusetts Fair Employment Practices Act in a race discrimination case, albeit one involving §1983, thus indicating an apparent if not an actual conflict of Circuits (*Burns v. Sullivan,* 1st Cir. 1980, 619 F. 2d 99).

This Court in *United Parcel Service v. Mitchell,* 1981, 451 U. S. 56, pursuant to its teaching that the appropriate Statute of Limitations is the one pertaining to a statute addressed to the specific factual situation rather than a Statute of Limitations of general applicability, directed the application of New York State's ninety-day statute relating to arbitrations to an action involving an arbitration award. This Court likewise recently directed the application of the Labor Management Relations Act's six-month statute to actions against unions involving unfair representation not related to racial discrimination. *DelCostello v. International Brotherhood of Teamsters,* 51 U.S.L.W. 4692 (U.S., June 8, 1983). Title VII itself requires the filing of a claim with a human rights agency within six months of the grievance.

The Second Circuit based its gross award upon the loss of income of "the 7 class members who first desired employment, had they applied" (12a). Two of the seven men were found to have expressed an interest in the laborer job to the laborer steward no later than *1971,* and the other five did not express such interest at all.

III. The standard of determination of union agency applicable to Civil Rights cases requires clarification.

The civil rights cases involving unions which this Court and the Courts of Appeals have heard heretofore all appear to have involved violations which occurred with the knowledge and approval of the officers and their membership. In this case, neither the union membership in the divisions located outside of the Garden nor any elected union official was aware of the union delegate's hiring procedures at the Garden, which procedures were inconsistent with the union's hiring procedures elsewhere.

With respect to various illegal acts by unions not covered by the Labor Management Relations Act, this Court has applied the standard of "clear proof of actual participation in, or actual authorization of such acts, or of ratification of such acts after actual knowledge thereof" set forth in the Norris-LaGuardia Act, 20 U. S. C. 106 (*United Mine Workers v. Gibbs,* 383 U. S. 715 [1966]).

With respect to union financial liability pursuant to a statute which required the application of common law rules of agency, this Court held that unions are not held liable for damages absent proof of instigation, ratification, support or encouragement of the strikes. *Carbon Fuel Company v. Mine Workers,* 1979, 444 U. S. 212.

New York State law provides that a union may not be held liable for money damages unless liability of the membership is proved through participation, authorization or ratification. *Martin v. Curran,* 303 N. Y. 276, 101 N. E. 2d 683 (1951). The Second Circuit in *Morrissey v. National Maritime Union of America,* 1976, 544 F. 2d 19 applied *Martin v. Curran,* and reversed the judgment for

compensatory damages against the union in an action brought under a federal statute regulating labor union activities. The District Court, referring to but not identifying *Morrissey* misstated *Morrissey* as relating to an award of punitive damages only and therefore as not in point (129a).

The Second Circuit upheld, *sub silentio,* the position that no question exists with respect to what standard of proof of union agency should be applied in connection with an award of money damages in civil rights cases.

It may fairly be presumed that other cases involving such standard of proof of union agency are pending. It appears appropriate that this Court address this error in the context of the instant case, particularly because of the large award of money damages.

IV. The backpay award appears to conflict with four teachings of this Court.

(a) The requirement of clear proof of actual futility.

The District Court made awards to nonapplicant porters based upon its finding that

> "the *atmosphere* at the Garden was such that class members *could reasonably have believed in the futility* of seeking referral from Local 3." (emphasis added.) (137a), and that *"feelings of futility* justified the victims' failure to apply for Garden laborer jobs" (emphasis added) (141a-142a).

The Second Circuit, *sub silentio,* adopted the District Court's subjective standard of reasonable belief of futility rather than objective futility supported by clear proof.

This Court in *Teamsters v. United States* taught that awards to nonapplicants may be made where the minority claimants failed to make application based upon "explicit and certain rejection"—not upon *feelings* of explicit and certain rejection—to which they did not wish to expose and humiliate themselves (431 U. S. at 365). This Court in *Clayton v. International Union, UAW* held that a plaintiff in a fair representation case must exhaust his remedies by applying to all available union offices unless the procedure clearly would have been futile.

A clarification of this Court's teaching with respect to nonapplicants in Civil Rights cases appears indicated.

(b) The requirements of acceptance of desired jobs without retroactive seniority.

None of the seven prevailing plaintiffs, most of whom had union positions in their own union, ever advised their own union that they were interested in becoming laborers, even though their own union controlled laborer jobs at Yankee Stadium and Shea Stadium and had knowledge of many other laborer jobs and would have referred them to the racially integrated Laborer unions which controlled those jobs.

Section 706(g) (42 U. S. C. §2000e-5[g]), in pertinent part provides that "amounts *earnable with reasonable diligence* by the person or persons discriminated against *shall* operate to reduce the backpay otherwise allowable" (emphasis added).

The District Court held that

> "The course urged by defendants would permit effective subversion of statutory purposes:

> employers could deny an individual a higher paying job and offer that individual the Hobson's choice of retaining his present job and forswearing backpay relief or leaving his present job for a job which, although perhaps nominally better paying, might require the sacrifice of convenience, security or seniority" (143a).

The Second Circuit, *sub silentio,* upheld this ruling.

This Court in *Ford Motor Co. v. EEOC* held that plaintiffs must announce their interest in a desired job which lacked the assurance of retroactive seniority, while preserving their legal claim to such seniority, even though such announcement would have entailed giving up their present jobs. A clarification of this Court's teaching with respect to the requirement of plaintiffs to mitigate their losses therefore is needed.

(c) The unwarranted exposure to liability with respect to applicants deemed unqualified for nonpretextual reasons.

Allied Maintenance had suspended and otherwise disciplined, while they worked as Garden porters, nine of the eighteen claimants among whom the Second Circuit divided the backpay awards given to the seven prevailing plaintiffs. The Garden testified that it would not voluntarily hire persons with comparable disciplinary records received while working at the Garden.

The District Court held that those disciplinary records are "irrelevant since, during the time period in question, the Garden never reviewed the prior work records of any laborer referrals" (144a). The Second Circuit, *sub silentio,* upheld this ruling.

This Court in *Texas Department of Community Affairs v. Burdine* held that misjudgment of an applicant's objective job qualifications does not expose a defendant to liability unless such misjudgment is found to be proof that the employer's reasons are pretextual. A clarification of this Court's teaching with respect to whether a misjudgment of qualifications may be *presumed* pretextual is indicated.

(d) The NLRB teaching that union liability for backpay abates when the union withdraws its interference with the employment of the grievant.

Early in 1977 Local 3 had done all it legally could do to abate damages, by proposing to the Garden that class members be hired. The Garden rejected the union's proposal and stated that all subsequent hiring must await the conclusion of its litigation—whereupon the Garden caused the addition of Local 3 as a defendant, and itself settled in 1979 by agreeing, *inter alia,* directly to hire five named persons.

The District Court held that "the defendant is liable for the effects of such practices through the time that the discrimination is actually remedied," and that Local 3's abatement is irrelevant absent actual reduction in plaintiff's injuries (141a). The Second Circuit, *sub silentio,* upheld this ruling.

This Court in *NLRB v. Teamsters* stated that NLRB principles should guide but not bind the courts in tailoring of remedies in Civil Rights cases. The applicable NLRB rulings provide that where a union is responsible for an employee's unemployment, backpay liability usually terminates when the union gives notice that it has no objection to his employment. These decisions have acted as a

brake upon windfalls for many years. A ruling by this Court with respect to whether the courts should be guided by the aforesaid NLRB decisions relating to backpay therefore is required.

V. The fully compensatory award of $217,000 to an attorney who obtained no class benefit for that work, and who prevailed primarily in obtaining backpay awards which he shared through contingency retainers, clearly is contrary to this Court's teaching in *Hensley v. Eckerhart*.

The Second Circuit awarded plaintiffs' attorney a fully compensatory fee of $217,000 for work which yielded no results other than backpay awards (except for retroactive seniority for six class members who had a legal right to demand arbitration to obtain such seniority). Sixty percent of the money judgment against the unions, including counsel's share of the backpay award, consisted of said fees.

This Court in *Hensley v. Eckerhart* recently held that a fully compensatory fee should be awarded only if the attorney obtained excellent results and significant overall relief for the class, and that for partial or limited benefit to the entire class the fee should be reduced. This Court's opinion gave no clear guidance with respect to the fee for a prevailing attorney who achieved no class benefit at all.

CONCLUSION.

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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